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CRIMINAL LAW ISSUES

ELLIS v. STATE, No. 10S05-0010-PC-593, ___ N.E.2d ___ (Ind. Mar. 23, 2001).
SHEPARD, C. J.

Appellant John B. Ellis seeks post-conviction relief, claiming that his guilty pleas to four rapes and related crimes were involuntary because the trial judge rejected the initial plea agreement as likely too lenient and indicated during the hearing the minimum sentence he would accept. We grant transfer to clarify the law about a judge's proper role in such matters, and affirm the denial of post-conviction relief.

. . . .

[O]ne of the victims, Jennifer Himelick, described her ordeal and objected to the proposed sentence. The trial judge decided to reject the agreement, saying:

> What I'm going to do is somewhat unusual because I don't usually do this in these cases and I want to make certain that everybody understands that I respect [the prosecutor's] decision and the decision of these other women in this situation so I'm not going to accept the Agreement today. I'm going to state what I will accept in this particular instance. I'll accept the Agreement with all concurrent sentences opting out Counts V and VI as it applies to Ms. Himelick and her case will go to trial or I will accept the Plea Agreement opting out Ms. Himelick's charges, Count V and VI, and then if Mr. Ellis accepts the plea and takes 20 years on the Rape in Ms. Himelick's case and agrees to accept consecutive sentencing in her case then I'll accept the Plea Agreement. So the sentences would be all concurrent with the exception of hers. As it applies to her case, they would have to be consecutive . . . .

[Citation to Record omitted.]

Defense counsel asked if the court would grant a change of venue, based on local

media coverage of the case, should Ellis decide to go to trial on the Himelick charges. The judge indicated openness to the request, subject to a hearing to assess the extent of bias in the community, and suggested the possibility of calling a "test jury." The court also cautioned Himelick that a trial would not necessarily result in a conviction, because Himelick was unable to identify Ellis positively as her attacker and because the admissibility of DNA evidence against Ellis had not yet been determined.

. . . .

Two months later, the parties submitted a new plea agreement that provided for a twenty-year sentence for all the charges related to Himelick followed by concurrent twenty-year sentences on all other charges. The aggregate sentence of forty years was, of course, consistent with what the judge previously said he would accept.

. . . .

A defendant's guilty plea must be voluntary. [Citation omitted.] The trial judge has a duty to assure that this is so, and also to impose a sentence that fits both the crime and the offender. Judicial participation in plea bargaining therefore presents special cause for concern. . . .

Our own modern examination of the judicial role in bargained cases commenced with Anderson v. State, 263 Ind. 583, 335 N.E.2d 225 (1975). There, the trial judge and Anderson negotiated an agreement for a plea in return for an executed sentence of eleven years, over the apparent opposition of the prosecutor. [Citation omitted.] The judge openly acknowledged his role, saying: "The Court accepts the plea of guilty with the plea bargaining done by the Court. . . .

This Court took a dim view of the idea that the judge and the defendant would negotiate a disposition. While concluding that such bargaining did not render a plea involuntary as a matter of law, we observed that the analysis of the facts and circumstances of such an event occurs "from the perspective that judicial participation in plea bargaining is highly suspect." [Citation omitted.] . . .

The sentencing judge in this case, of course, was hardly negotiating one-on-one with the defendant as the trial judge had done in Anderson.

Rather, the court followed a standard path for entertaining a bargain submitted by the parties. The judge ordered a presentence report and had it before him on the date set for sentencing. He heard testimony by the victim, the arguments of counsel, and so on. This was in accordance with the provisions of our statute governing entry of judgment and sentencing, ... [citation omitted] [footnote omitted.] . . .

. . . .

[W]e concluded that a judge had gone too far in the very recent case of Garrett v. State, 737 N.E.2d 388 (Ind. 2000). The trial judge pressed Garrett at length to plead guilty by emphasizing the potential sentence and ultimately declaring, "I'm telling you, if it's me and you get found guilty with this record you'll get the [maximum] eighty years." [Citation omitted.] The judge went on to ask, in a disparaging manner, what defense Garrett planned to present. [Citation omitted.] . . .

. . . .

Unlike Garrett, the court here did not pressure Ellis to enter or even consider a guilty plea. Indeed, one of the two alternatives the judge suggested involved trial on one set of charges. Nor did the court here threaten or otherwise express any intent to impose an especially harsh sentence if Ellis opted to proceed to trial. In further contrast to Garrett, the court did not disparage Ellis' proposed defense. In fact, the judge pointed out in Ellis' presence that the State's case relied on DNA evidence that might or might not be admissible at trial.

Here, as in Williams, the court reacted to a proposed plea only after it was negotiated

by the parties and presented to the court as a mutual agreement. The court did not engage in any "unnecessary and unwise" "editorializing." [Citation omitted.] The parties here proposed an agreement that the court, exercising its discretion, declined to accept. Rather than sending the parties away to guess again at what might pass muster in some judicial version of hide-the-ball, the court indicated that the proposal was too lenient and offered two alternatives that it would deem acceptable, ...

While judicial involvement in plea negotiations can certainly go too far, a complete prohibition on judicial comment regarding a proposed plea agreement would create a separate set of problems. When a court exercises its discretion to reject a plea agreement, it is in both parties' interests that the court explain its reasons. [Citation omitted.] If a proposal falls outside the range of what the court regards as reasonable, it will be helpful to

the parties to know whether the court found the proposal too lenient or too harsh, so that they may re-negotiate if both choose to do so. . . .

While the American Bar Association's Standards for Criminal Justice have changed over time, Indiana's statutory procedure and the sequence of events in this case are largely congruent with the current version of these standards:

> A judge should not ordinarily participate in plea negotiation discussions among the parties. Upon the request of the parties, a judge may be presented with a proposed plea agreement negotiated by the parties and may indicate whether the court would accept the terms as proposed and if relevant, indicate what sentence would be imposed. Discussions relating to plea negotiations at which the judge is present need not be recorded verbatim, so long as an appropriate record is made at the earliest opportunity. For good cause, the judge may order the record or transcript of any such discussions to be sealed.[3]

A.B.A. Standards for Criminal Justice 14-3.3(d) (3d ed. 1997).

As the Standards indicate, a court may offer guidance as to what sentence it might find marginally acceptable, taking into account a presentence report prepared by the probation department. The message must not, of course, carry any express or implied threat that the defendant may be denied a fair trial or punished by a severe sentence if he or she declines to plead guilty. [Citation omitted.]

. . . .

After his initial plea was rejected, Ellis had two months to consider his alternatives with the advice of counsel. The court again fully apprised Ellis of his rights and the consequences of his revised plea. Ellis asserted on the record that his plea decision was free and voluntary. We agree that it was.

. . . .

[3] In this case, of course, the entire exchange during the plea hearing was recorded verbatim. Where discussion occurs in a setting such as a pre-trial conference, a pre-trial order or a chronological case summary notation will frequently suffice.

BOEHM, DICKSON, RUCKER, and SULLIVAN, JJ., concurred.

SMITH v. STATE, No. 49S02-0103-CR-170, ___ N.E.2d ___ (Ind. Mar. 27, 2001).

BOEHM, J.

We grant transfer in this criminal appeal to decide whether retaining a defendant's DNA profile from a prior unrelated case and using it in a subsequent case violates the right to be secure from unreasonable searches and seizures under the Fourth Amendment of the United States Constitution and Article I, Section 11 of the Indiana Constitution. We also address whether retention of the DNA profile violated Indiana Code section 10-1-9-8. We affirm the trial court's denial of the defendant's motion to suppress this evidence.

. . . .

In September 1997, Damon Smith was arrested and charged with rape in an unrelated case ("Case 1"). He was ordered by the trial court to provide hair, blood, and saliva samples. These were used by the Indianapolis-Marion County Forensic Services Agency ("Crime Lab") to create a DNA profile. On July 28, 1998, Smith was tried in Case 1. The DNA evidence identified Smith as the donor, but the jury acquitted Smith based on his defense that the intercourse was consensual.

In July 1998, according to the Crime Lab's routine procedures, Smith's profile from Case 1 was compared to those from unsolved cases and showed a tentative match to V.O.'s assailant. . . . According to the probable cause affidavit, further testing "concluded that the DNA results showed that Damon Lamont Smith . . . is . . . without a doubt the subject who raped V.O." Smith was charged with rape, robbery, and burglary.

. . . .

Smith had a legitimate expectation of privacy in his body and blood samples at the time they were taken in the investigation of Case 1. [Citation omitted.] We agree that this includes the DNA residing in the cells of these samples. However, he does not challenge the original court order that authorized the seizure of these items. There has been no seizure or invasion of Smith's privacy since the initial samples taken in Case 1. His claim thus reduces to the contention that the information must be destroyed after the investigation that analyzed it is concluded, or at least cannot be used in a subsequent investigation. We agree with several courts that have held that, once DNA is used to create a profile, the profile becomes the property of the Crime Lab. Thus, Smith had no possessory or ownership interest in it. . . .

. . . .

As the Court of Appeals noted under the Indiana Constitution, this Court has "recognized that law enforcement agencies are permitted to retain and reuse fingerprint records as well as other records of arrested parties." Smith, 734 N.E.2d at 711 (citing Voelker v. Tyndall, 226 Ind. 43, 47-48, 75 N.E.2d 548, 551 (1947); State ex rel. Mavity v. Tyndall, 224 Ind. 364, 378, 66 N.E.2d 755, 760-61 (1946)). We agree that this is equally true for DNA profiles.

In sum, Smith has no standing to contest the comparison of his DNA profile to the evidence gathered from V.O.'s crime, and that comparison does not constitute a search or seizure under the Indiana Constitution. Accordingly, Smith raises no issue under Article I, Section 11.

. . . Finally, Smith claims that inclusion of his DNA profile in the Crime Lab database violated Indiana Code section 10-1-9-8. In 1996, that section authorized the Superintendent of the State Police to create an Indiana DNA database consisting of "records for convicted criminals, crime scene specimens, unidentified missing persons, and close biological relatives of missing persons." Ind.Code § 10-1-9-8(a) (1998).

Smith argues that Indiana Code section 10-1-9-8 authorizes retention of DNA samples only in the four limited categories. Because he is not a convicted criminal, his DNA profile falls in none of the four. He contends that the statutory categories are exhaustive. . . .

. . . .

It is clear that this statute was drafted with concern for widespread dissemination of the records. . . . Use of the term "authorized" rather than "required" in describing the effect of a conviction suggests that the databank is to include only profiles of samples that fit within one of the four categories of (1) convicted criminals, (2) crime scene samples, (3) unidentified missing persons, or (4) close biological relatives of missing persons.

. . . .

Smith contends that because he was acquitted in Case 1, the sample taken in that case falls into none of the four categories for which the database was created. From this,

he reasons that the admission of his DNA profile would violate the database statute. We agree that he meets none of the criteria for inclusion in the database, but disagree that exclusion of the evidence of the DNA match is a consequence of that circumstance.

. . . .

In any event, assuming the database is implicated, we agree with Smith that the statute seems to limit inclusion of profiles to the statutory categories. As noted, it refers to "expungement" of records "authorized" to be included by reason of a conviction. The implication seems strong that without the conviction, the inclusion is not "authorized." And the inclusion of the statutory list of eligible profiles seems meaningless without construing it, as Smith urges, to limit the profiles that may be maintained in the database. . . . We conclude that the statute was hammered out to balance concerns for potential misuse of a

mass of profiling of the citizenry against the obvious and very significant contribution to law enforcement that the database can make. Accordingly, Smith's motion raises the question whether the exclusionary rule applicable to searches and seizures that violate the state or federal constitution should apply to profiles that are included in the database from sources not authorized by the statute.

. . . The [exclusionary] rule is entirely a creation of judicial precedent. Nothing in the state or federal constitution explicitly requires it. Similarly, there is no statutory direction as to the admissibility of DNA profiles included or retained in the database without statutory authorization. Unlike the two constitutions, however, the database statute does include a number of explicit prohibitions and sanctions. As already noted, some misuse of the information is subject to criminal penalties. . . . Because of this range of other sanctions, we are not faced with the total absence of incentive to comply with the law that led both state and federal courts to adopt the exclusionary rule as to constitutional violations. [Citations omitted.]

Exclusion of extremely valuable evidence in crimes that often leave little other trace is a major social cost. In the absence of a clear directive from the legislature on the need to exclude this evidence and in view of the very substantial law enforcement benefits from the database, we conclude that the potential for abuse in the future is not sufficiently clear to warrant adopting a rule excluding evidence from the database on the ground that it was obtained or retained beyond the authorized classifications. . . . If experience with the database statute suggests that denial of admissibility of DNA profiles obtained in violation of the statute is the only practical means of securing compliance with the "privacy standards described in [the database statute]" we can revisit this issue. The General Assembly is free to reconsider it at any time.

. . . .

SHEPARD, C. J., and DICKSON, RUCKER, and SULLIVAN, JJ., concurred.

JEFFRIES v. STATE, No. 49A02-0006-PC-393, ___ N.E.2d ___ (Ind. Ct. App. Mar. 26, 2001).

NAJAM, J.

On September 30, 1998, Jeffries pleaded guilty to two counts of C felony burglary. [Footnote omitted.] His written plea agreement with the State included the following provision:

> . . . [T]he State reserves the right to question witnesses and comment on any evidence presented upon which the Court may rely to determine the sentence to be imposed; to present testimony or statements from the victim(s) or victim representative(s); and at the time of sentencing will make the following recommendation as to the sentence to be imposed: 6 years executed on each count, to be served concurrently. Also, State will recommend 2 years executed for probation violation under 49G05[-]9305 . . . and 4 years executed for probation violation under 49G06[-]9212[-]CF[-]172404.

[Citation to Record omitted.] The Marion Superior Court, Criminal Division 3 ("Court 3"), accepted Jeffries' plea after informing him of his constitutional rights and determining that the plea was made freely, ... Court 3 sentenced Jeffries to six years executed on each count of burglary and ordered the sentences to be served concurrently in accordance with the terms of the plea agreement.

Shortly thereafter, the Marion Superior Court, Criminal Division 5 ("Court 5"), imposed a three-year sentence for Jeffries' probation violation in Cause No. 49G05-9305-CF-064175. The court ordered the sentence to be served concurrent with the sentence

imposed for Jeffries' probation violation in Cause No. 49G05-9303-CF-029021 and consecutive to the aggregate six-year sentence imposed by Court 3 on the burglary counts. [Footnote omitted.] [J]effries filed a petition for post-conviction relief, alleging in part that his three-year aggregate sentence for the probation violations in Court 5 constituted a breach of the plea agreement entered into in Court 3 . . . . . .

. . . .

[I]t is well settled that the terms of a plea agreement, once accepted by the trial court, are binding upon the court only "insofar as said terms are within the power of the trial court to order." [Citations omitted.] . . .

Upon accepting Jeffries' plea of guilty, Court 3 imposed an aggregate six-year sentence on the burglary charges, thereby honoring the terms of the plea agreement. However, any sentence resulting from a separate probation violation would have been entirely out of Court 3's scope of authority to impose. Rather, the imposition of a sentence for the violations of probation in Cause Nos. 49G05-9305-CF-064175 and 49G05-9303-CF-029021 was within the exclusive jurisdiction of Court 5. [Citation omitted.] Indeed, Court 3 informed Jeffries on more than one occasion during the guilty plea hearing that he would receive a two-year sentence for the probation violations "if the other Courts follow the State's recommendations[,]" [citation to Record omitted], and that "other Judges will have to order those [sentences.]" [citation to Record omitted.] Accordingly, Jeffries would not be entitled to specific performance of the plea agreement term requiring the imposition of an aggregate two-year sentence for the probation violations in Cause Nos. 49G05-9305-CF-064175 and 49G05-9303-CF-029021, a term beyond Court 3's power to honor.

It is an entirely different matter, however, when a promise made to a defendant affects the voluntariness of his guilty plea. [Citations omitted.] . . .

> . . . [Court 3]: All right. Well, I'll tell you now if those sentences are not imposed in those Courts as we've discussed here today, I'll set aside your conviction.
>
> . . . .
>
> [Court 3]: I mean, I can't - - other Judges will have to order those, but I'm telling you if you don't get the benefit of what you bargained for in those Courts, I'll set aside your plea agreement in this case if you want me to. Do you understand that, Mr. Jeffries? . . .
>
> . . . .

[Citation to Record omitted.] Court 3 made a promise to Jeffries that if he were not sentenced to two years on the probation violations in Cause Nos. 49G05-9305-CF-064175 and 49G05-9303-CF-029021, it would set aside the plea. A question thus remains whether Jeffries was induced to plead guilty by Court 3's promise and whether Jeffries' guilty plea should be set aside for lack of voluntariness. [Citation omitted.]

. . . Accordingly, we remand to the post-conviction court for a determination of whether Court 3's unfulfilled promise to Jeffries that his plea would be set aside if he did not receive an aggregate two-year sentence from Court 5 for the probation violations in Cause Nos. 49G05-9305-CF-064175 and 49G05-9303-CF-029021 rendered his plea involuntary.

. . . .

KIRSCH and VAIDIK, JJ., concurred.

LASHLEY v. STATE, No. 5A01-0009-CR-303, ___ N.E.2d ___ (Ind. Ct. App. Mar. 26, 2001).
NAJAM, J.

Lashley next challenges the validity of the State's charging information. He asserts that the charging information was defective because Sergeant Bolin signed it, "I affirm under the penalties of perjury that the foregoing representations are true to the best of my knowledge and belief[,]" before the prosecutor had inserted the charges against him. [Footnote omitted.] [Citation to Record omitted.] . . .

Indiana Code Section 35-34-1-2(b) provides that "[a]n information shall be signed by the prosecuting attorney or his deputy and sworn to or affirmed by him or any other person." We have held that the purpose of requiring the signature of the prosecuting attorney or his deputy to an information is "to assure that such prosecutions have been investigated by and approved by the only officer authorized to initiate criminal prosecutions, namely, the prosecuting attorney." [Citations omitted.] . . .

Here, for administrative convenience, Sergeant Bolin signed a blank charging information under oath, which was approved by Monte Kivett, then a Morgan County deputy prosecutor. On its face, the charging information satisfied the requirements of Indiana Code Section 35-34-1-2(b). [Citations omitted.] While Sergeant Bolin should have sworn to the contents of the information after the charges had been inserted, on these facts his failure to do so did not render the charging information fatally defective or require dismissal of the charges against Lashley.

Unlike a prosecutor's signature of approval, which is necessary because he is the only officer authorized to initiate a criminal prosecution on behalf of the State, a prosecuting witness' signature serves simply to foreclose the filing of frivolous charges by imposing the penalties of perjury upon the prosecuting witness. [Citations omitted.] When Sergeant Bolin submitted the pre-signed charging information, he also submitted his police report, his suggested charges, and "any information pertinent to the charges[,]" and the State charged Lashley based upon the evidence identified by Sergeant Bolin. [Citation to Record omitted.] The State also filed Sergeant Bolin's probable cause affidavit averring under penalties of perjury the facts supporting the charges against Lashley. At trial, the sergeant testified under oath to the allegations contained in the charging information. Sergeant Bolin's sworn testimony both in his affidavit and at trial effectively served the purpose of assuring that the charges against Lashley were not frivolous. [Citation omitted.]

. . . .

KIRSCH and VAIDIK, JJ., concurred.

CIVIL LAW ISSUES

ELMER BUCHTA TRUCKING, INC. v. STANLEY, No. 14S01-0002-CV-114, ___ N.E.2d ___ (Ind. Mar. 26, 2001).

SHEPARD, C. J.

Under Indiana's wrongful death statute, [IC 34-23-1-1] a decedent's estate may recover damages for the lost earnings of the deceased, among other things. This has long been understood not to include that portion of decedent's earnings that the decedent himself would have consumed for his own personal expenses and maintenance. The question here is whether the legislature changed that rule in 1965. We conclude it did not.

. . . .

. . . [T]he statute has long been understood to contemplate a deduction for the amount of personal maintenance expenses that the decedent would have incurred over the remainder of his lifetime. . . .

. . . .

Thus, in applying the wrongful death statute to compensate the deceased's beneficiaries for losses they suffer, the defendant should be permitted to present evidence of the deceased's personal consumption. If juries cannot deduct the deceased's personal living expenses from lost earnings, the amount of the award will necessarily exceed the actual financial loss experienced by the beneficiaries. This result is not one contemplated

by the statute. Therefore, the proper measure of damages must include a deduction based on the costs of this personal maintenance.

. . . .

That juries should account for actual financial loss has been held the object of the statute from the Nineteenth Century through to the last two decades. We cannot find legislative desire to alter that formula in the relatively general amendments adopted thirty-six years back.

Accordingly, we conclude that the trial court erred in granting Stanley's motions in limine and in preventing Buchta from introducing evidence regarding the amount of his lost earnings that Michael Stanley would have consumed for personal expenses throughout his life.

. . . .

BOEHM, RUCKER, and SULLIVAN, JJ., concurred.

DICKSON, J., filed a separate written opinion in which he dissented, in part, as follows:

The Wrongful Death Act declares that damages shall include "lost earnings of such deceased person resulting from said wrongful act or omission." I cannot agree that the phrase "lost earnings" is ambiguous. I believe that the majority errs in construing this phrase and assigning it a meaning contrary to plain and ordinary usage. . . .

NOBLE COUNTY v. ROGERS, No. 57S03-0003-CV-218, ___ N.E.2d ___ (Ind. Mar. 27, 2001).

SULLIVAN. J.

After a court overturned a restraining order that a county building inspector had obtained against Crystal Rogers, she sought damages under a trial rule that awards costs and damages to those wrongfully enjoined by governmental entities. Both the trial court and the Court of Appeals held that Rogers could recover under the trial rule despite the immunity provisions of the Indiana Tort Claims Act. We hold that Rogers is not entitled to damages because the county's conduct was not wrongful for purposes of the trial rule.

. . . [A] Noble County building inspector issued a stop work order on November 12, 1996, asserting that the project violated the Noble County Building Code because Rogers had not obtained a building permit. Rogers continued construction until the county obtained a temporary restraining order.

Rogers appealed the trial court's decision to the Court of Appeals, which reversed and dissolved the temporary restraining order. Rogers v. Noble County By and Through the Noble County Bd. of Comm'rs, 679 N.E.2d 158 (Ind. Ct. App. 1997), transfer denied. . . . The court

On remand, Rogers asserted that she was entitled to damages under Indiana Trial Rule 65(C). Her counterclaim sought compensation for the cost of finding another place to live while the restraining order was in place and for damage to the house caused by

exposure to the elements. Noble County moved for summary judgment on the counterclaim, arguing that the Indiana Tort Claims Act precluded her recovery. . . .

The Court of Appeals held that Trial Rule 65 is procedural in nature and therefore trumped the conflicting provisions of the Tort Claims Act. Noble County ex rel. Noble County Bd. of Comm'rs v. Rogers, 717 N.E.2d 591, 596 (Ind. Ct. App. 1999). We granted transfer, thereby vacating the Court of Appeals decision. Noble County ex rel. Noble County Bd. of Comm'rs v. Rogers, 735 N.E.2d 227 (Ind. 2000) (table).

[I]ndiana Trial Rule 65(C), which reads:

> No restraining order or preliminary injunction shall issue except upon the giving of security by the applicant, in such sum as the court deems proper, for the payment of such costs and damages as may be incurred or

suffered by any party who is found to have been wrongfully enjoined or restrained. No such security shall be required of a governmental organization, but such governmental organization shall be responsible for costs and damages as may be incurred or suffered by any party who is found to have been wrongfully enjoined or restrained. . . .

. . . Noble County argues that two of the specific immunity provisions of Indiana Code § 34-13-3-3 preclude the damages Rogers sought in her counterclaim:

> A governmental entity or an employee acting within the scope of the employee's employment is not liable if a loss results from:
> . . .
> (5) the initiation of a judicial or an administrative proceeding;
> (6) the performance of a discretionary function; . . . [Footnote omitted.]

The parties ask us to resolve this apparent conflict by applying either the Trial Rule or the ITCA to the exclusion of the other. [Footnote omitted.] . . .

[A] proper construction of the word "wrongfully" in the Trial Rule resolves the conflict between the rule and the statute. We have never had the opportunity to determine the scope of wrongful conduct for governmental actors under T.R. 65(C). We now hold that their conduct is wrongful only to the extent that they have acted with such bad faith and malice that their actions undermine the authority of the court issuing the restraining order or injunction. [Footnote omitted.]

This construction harmonizes the immunity provisions of the ITCA with our inherent power to sanction litigants for improper or untoward behavior in judicial proceedings. . . .

The Legislature's ability to immunize government actions knows few limits, but those limits are reached when immunity impinges upon the judiciary's constitutional sphere. That is, while the Legislature may shield the State from substantive tort liabilities, it may not immunize the State from our power to sanction the attorneys and parties appearing before us. [Citations omitted.] . . .

. . . .

[O]ur interpretation of the word "wrongfully" in the last sentence of T.R. 65(C) must balance the limitations of the ITCA with the judiciary's inherent power to sanction. So long as any damages granted under Trial Rule 65(C) are part and parcel of our sanctioning power, the constitutional conflict the parties point to is not at issue. . . .

. . . The dispute over the restraining order focused on the purely legal question [footnote omitted] of the characterization of a building code. [Citation omitted.] The record and the two previous opinions reveal no hint that Noble County was motivated by anything other than a concern for safety. The trial court should have granted Noble County's motion for summary judgment as to Rogers's damage claims.

. . . .

SHEPARD, C. J. and RUCKER, J., concurred.

BOEHM, J., filed a separate written opinion in which he dissented and in which DICKSON, J., concurred, in part, as follows:

I respectfully dissent. I do not believe that a suit for wrongful enjoinment implicates the Tort Claims Act. Rather, I would conclude that, under Trial Rule 65(C), a governmental entity seeking a preliminary injunction voluntarily assumes the obligation to pay costs and damages arising from a wrongful injunction. As a result, the claim by a person wrongfully enjoined is not one arising in tort and the Tort Claims Act, which bars only claims "in tort," does not preclude recovery of those costs and damages from a governmental entity. More importantly, the majority's approach does nothing to resolve the tension between the Tort Claims Act and Trial Rule 65(C), and ignores the point that this Trial Rule has been

repeatedly enacted by the legislature, both before and after the Tort Claims Act. I also find no support for the majority's conclusion that a governmental entity - or any other party to a lawsuit - acts "wrongfully" under Trial Rule 65(C) only where it acts in "bad faith" or with "malice" in invoking the power of the courts. It seems to me that the majority's rule is inherently self-contradictory. If the Tort Claims Act applies at all to a wrongful injunction, it provides protection to the governmental entity even for acts taken maliciously or in bad faith. Indeed, as explained below, the torts that the Act does immunize - malicious prosecution and abuse of process - have bad faith as an element. Thus, allowing suit only in the event of bad faith or malice, although possibly supportable as a policy matter, is a position incompatible with the Tort Claims Act and, in my view, amounts to rewriting the statute.

. . . .

The Tort Claims Act is substantive law enacted by the legislature. It grants immunity in tort to governmental entities for initiation of judicial proceedings. Rule 65(C) imposes the requirement that the government assume the risk of liability if it chooses to seek a preliminary injunction. I agree that this provision could have been overridden by the legislature if it had chosen to do so. But the Rule and statute as presently written are compatible and do not encroach upon one another. Both have been repeatedly adopted by the General Assembly. In sum, Noble County agreed to reimburse Rogers when it sought to obtain a preliminary injunction. I would affirm the trial court.

SPEARS v. BRENNAN, No. 49A02-0003-CV-169, ___ N.E.2d ___, (Ind. Ct. App. Mar. 26, 2001).

NAJAM, J.

Greg A. Spears challenges the trial court's entry of summary judgment in favor of attorney and debt collector Timothy R. Brennan on Spears' complaint alleging violations of the Fair Debt Collection Practices Act ("the FDCPA" or "the Act"), 15 U.S.C. § 1692 et seq. . . .

. . . .

When Spears stopped making the loan payments, American General retained Brennan to collect the unpaid contract balance.

On October 24, 1996, Brennan sent a debt collection notice [footnote omitted] to Spears that read: [footnote omitted]

> . . . This communication is from a debt collector and is an attempt to recover a debt owed to the above named Creditor[;] any information obtained will be used for that purpose. Verification of the debt or the name and address of the original Creditor, if different than the above, will be provided upon written request to this office within thirty (30) days[;] otherwise the debt will be assumed valid.

[Citation to Record omitted.] . . . Brennan's notice of claim further stated:

> THIS IS AN ATTEMPT TO RECOVER YOUR DEBT OWED TO [AMERICAN GENERAL][;] ANY INFORMATION OBTAINED WILL BE USED FOR THAT PURPOSE. VERIFICATION OF THE DEBT, OR, THE NAME AND ADDRESS OF THE ORIGINAL CREDITOR, IF DIFFERENT THAN THE ABOVE, WILL BE PROVIDED UPON WRITTEN REQUEST TO THIS OFFICE WITHIN 30 DAYS[;] OTHERWISE THE DEBT WILL BE ASSUMED VALID. A REQUEST FOR INFORMATION WILL NOT RESULT IN A DELAY OF LEGAL PROCEEDINGS.

[Citation to Record omitted.] . . .

. . . .

In his consumer credit contract with American General, Spears agreed to pay "reasonable attorney's fees" incurred by the company for the collection of any unpaid contract balance. [Citation to Record omitted.] . . . Brennan sought $972.82 in attorney's fees, equal to one-third of the principal amount of Spears' $2,918.47 debt. The attorney's fees requested were added to the judgment against Spears for a total money judgment of $3,891.29. Brennan conceded in response to a request for admissions that he regularly seeks a one-third contingent fee for his debt collection services, and he admitted that he did not spend more than two hours preparing the notice of claim against Spears. [S]pears asserts that Brennan violated the foregoing provisions of the FDCPA "by misrepresenting the amount of attorney's fees to which he was entitled." [Citation to Brief omitted.] . . .

Brennan responds that, regardless of whether a one-third contingent fee was in fact reasonable in the debt collection case, he did not "mispresent" the amount of attorney's fees to which he was entitled simply "by requesting attorney's fees in the amount of approximately one-third . . . of the principal loan balance." [Citation to Brief omitted.] . . .

. . . .

Brennan was not prohibited as a matter of law from seeking a contingent fee, but he was required to present "other objective evidence of reasonableness" in order for the attorney's fees to be added to the judgment against Spears. [Citation omitted.]

. . . .

We hold, therefore, that Brennan did not violate 15 U.S.C. §§ 1692e or f(1) when he merely requested $972.82 in attorney's fees in his debt collection claim against Spears. . . .

[W]e need not decide whether a debt collection notice must explicitly inform the consumer he can dispute any portion of a debt within thirty days of receiving the notice because we conclude, as a matter of law, that Brennan's notice did not adequately advise Spears he could dispute the debt to American General at all. . . .

We also conclude that Brennan's debt collection notice did not adequately inform Spears that he had thirty days from his receipt thereof to dispute the validity of the debt and, thus, failed to comply with 15 U.S.C. § 1692g(a)(3). The debt collection notice advised Spears only that he must seek verification of the debt "within thirty days[;] otherwise the debt will be assumed valid." Record at 33 (emphasis added). It is unclear from the face of the notice whether Spears had thirty days from the date the notice was sent, October 24, 1996, or the date it was received, [footnote omitted] to seek verification of the debt. [Citation omitted.] . . .

Finally, Spears maintains that Brennan's notice advising him that "verification of the debt . . . will be provided upon written request" imposed an invalid requirement that he dispute the validity of the debt to American General in writing. [Citation to Record omitted.] Without deciding whether the FDCPA prohibits a debt collector from requiring a debtor to

dispute the validity of a debt in writing, [footnote omitted] we determine only that Brennan did not violate the FDCPA by advising Spears that verification of the debt would be provided if requested in writing. 15 U.S.C. § 1692g(a)(4) clearly requires that a debt collector's notice contain a statement that verification of the debt will be provided if requested in writing within thirty days of receipt of the debt collection notice. Brennan properly advised Spears of this verification right under the FDCPA.

. . . .

As discussed above, 15 U.S.C. § 1692g(a) requires a debt collector to send a debt collection notice stating, among other things, that unless the debtor disputes the validity of the debt within thirty days from receipt of the debt collection notice, the debt collector will assume the debt is valid. [Citation omitted.] . . .

In this case, Brennan's notice of claim contained an order for Spears to appear in small claims court and answer to the debt owed American General on November 13, 1996, only twenty days after the debt collection notice had been sent. . . .

. . . While it is true that the small claims court set the hearing on the debt collection claim for November 13, 1996, and ordered Spears to appear on that date, it was Brennan's duty, as a debt collector under the FDCPA, to obtain a hearing date outside the thirty-day debt validation period so as not to undercut Spears' verification rights. Having filed suit and required Spears to answer to the debt owed American General on November 13, 1996, Brennan violated the FDCPA by implying that Spears did not have thirty days to dispute the same. [Citation omitted.]

. . . .

Brennan had the burden of showing that he scheduled the November 27, 1996 hearing and obtained a default judgment against Spears outside the thirty-day debt validation period. It was therefore necessary for him to prove the date on which Spears received the debt collection notice. Having failed to meet that burden, Brennan was not entitled to summary judgment. . . .

Although we reverse the trial court's entry of summary judgment, in the interest of judicial economy we will address Brennan's contentions, which are likely to be raised again on remand. . . . Brennan suggests that by consenting to a hearing date within the thirty-day debt validation period and then failing to appear on that date to answer to the debt owed American General, Spears waived any future claim under the FDCPA. Brennan does not provide, nor have we found, any authority for the proposition that consumers may waive the protections of the FDCPA. To the contrary, several courts have addressed this very issue and determined that consumers may not waive their rights under the Act.

. . . .

We believe that 15 U.S.C. § 1692g(a) is also in the nature of a statutory tort which is completed once the debt collector undercuts the thirty-day debt validation period or implies the debtor does not have thirty days from receipt of the debt collection notice to dispute the validity of the debt. . . . In light of the foregoing authority and the "broad remedial purpose of the FDCPA[,]" we conclude that Spears did not waive his verification rights under 15 U.S.C. § 1692g(a) when Shepard agreed to the November 27, 1996 hearing date and when he and Shephard failed to appear for the hearing. [Citation omitted.]

. . . .

[W]e address Spears' claim that Brennan violated 15 U.S.C. § 1692g(b) when he failed to cease collection of the debt after receiving Spears' written notification, within the thirty-day debt validation period, that Spears was disputing the debt. . . .

Brennan maintains, however, that there was no violation of the FDCPA because he "sent adequate verification of the debt [to Spears] in the October 30, 1996 notice of claim." [Citation to Brief omitted.] Specifically, Brennan claims that a copy of the consumer credit

contract between Spears and American General attached to the notice of claim provided sufficient verification of the debt within the meaning of 15 U.S.C. § 1692g(b). We cannot agree.

The contract in no way provides sufficient verification of the debt. A review of the document reveals that it identifies only the terms of Spears' loan, including a 17.99% annual interest rate and the original loan amount of $2,561.59. The loan agreement contains no accounting of any payments made by Spears, the dates on which those payments were made, the interest which had accrued, or any late fees which had been assessed once Spears stopped making the required payments. . . . Therefore, Brennan violated 15 U.S.C. § 1692g(b) when he failed to cease collection of the debt by obtaining a default judgment against Spears after Spears had notified Brennan in writing that he was

disputing the debt but before Brennan had mailed verification of the debt to Spears. [Citation omitted.] We reverse the trial court's entry of summary judgment in favor of Brennan on this issue.

. . . .

BROOK and SULLIVAN, JJ., concurred.

SHERROW v. GYN, LTD., No. 89A01-0007-CV-219, ___ N.E.2d ___ (Ind. Ct. App. Mar. 27, 2001).

SHARPNACK, C. J.

The third issue is whether the trial court erred in refusing to require the parties to redact all legal argument from their submissions to the medical review panel. Sherrow argues that Riley, the panel chairperson, failed to properly instruct the panel on the law applicable to the case by allowing the health care providers to include improper legal arguments in their evidentiary submissions, and that the trial court erred by refusing to strike the legal argument from the submissions.

. . . Medical review panels consist of three health care providers and one attorney, who serves as chairperson. Ind. Code § 34-18-10-3. Parties are permitted to submit evidence to the panel. Ind. Code § 34-18-10-17. This evidence may consist of "medical charts, x-rays, lab tests, excerpts of treatises [presumably only medical treatises], depositions of witnesses including parties, and any other form of evidence allowable by the medical review panel." Id. In addition, the medical review panel may consult with other medical authorities (including other physicians) and reports by other health care providers. Ind. Code § 34-18-10-21; [citation omitted.]

Here, the evidentiary submission at issue contained discussion of the legal standards applicable in medical malpractice cases. Pursuant to the governing statutes, we conclude that such legal argument is inappropriate in evidentiary submissions because legal argument is not "evidence." . . . Neither statute authorizes parties to submit their interpretations of guiding legal precedent to the panel.

. . . The chairperson, based upon his or her professional experience as an attorney, bears the responsibility for advising the three medical professionals on the panel about the law. In light of this statutory framework, parties should not be permitted to bypass the chairperson and include legal arguments in their evidentiary submissions. [Citations omitted.] If parties were permitted to include legal argument in their evidentiary submissions, then parties' evidentiary submissions would become lengthy legal memoranda in which the parties debate and argue points of law. Such a result would not further the legislature's intent that medical review panels should operate in an informal manner. [Citation omitted.] Thus, if parties want the panel to be advised on any legal question during the medical review process, they should submit a request to the panel chairperson instead of including legal argument in evidentiary submissions, which are given

to the entire panel.

In this case, the trial court erred by not redacting all legal argument from Dr. Woodruff, Dr. Haswell, and GYN's evidentiary submission to the medical review panel. Consequently, we reverse the trial court's ruling and remand with instructions to redact all legal argument from the submission.

. . . .

MATHIAS snd SULLIVAN, JJ., concurred.

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CASE CLIPS TRANSFER TABLE

November 16, 2001

This table lists recent grants of transfer by the Indiana Supreme Court for published decisions of the Court of Appeals. It includes Judicial Center summaries of the opinions of the Court of Appeals vacated by the transfers and of the Supreme Court's opinions on transfer.

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A grant of transfer vacates the opinion of the Court of Appeals: "[i]f transfer be granted, the judgment and opinion or memorandum decision of the Court of Appeals shall thereupon be vacated and held for naught, except as to any portion thereof which is expressly adopted and incorporated by reference by the Supreme Court, and further, except where summarily affirmed by the Supreme Court." Indiana Appellate Rule 11(B)(3).

Case Name	N.E.2d citation, Ct. Appeals No.	Court of Appeals Holding Vacated by Transfer Grant	Transfer Granted	Supreme Court Opinion After Transfer
Owens Corning Fiberglass v. Cobb	714 N.E.2d 295 49A04-9801-CV-46	Defense should have received summary judgment as plaintiff showed only that he might have been exposed to its asbestos	01-19-00	
Krise v. State	718 N.E.2d 1136 16A05-9809-CR-460	(1) officers' entry into home to serve body attachment not illegal; (2) roommate gave voluntary consent to search; (3) scope of consent extended to defendant's purse located in common bathroom	2-17-00	
Elmer Buchta Trucking v. Stanley	713 N.E.2d 925 14A01-9805-CV-164	(1) Wrongful Death Act mandates recovery of the entire amount of a decedent's lost earnings without an offset for personal maintenance, and (2) defense not entitled to instruction that action not to punish defendant and that any award of damages could not include compensation for grief, sorrow, or wounded feelings	2-17-00	
Hancock v. State	720 N.E.2d 1241 34A02-9808-CR-657	Conviction for breath-alcohol formu-lation of I.C. 9-30-5-1, not challenged at trial but later held unenforceable in Court of Appeals' *Sales v. State*, was fundamental error [Note - *Sales* was vacated by transfer 1-18-00 and statute held enforceable in opinion at 723 N.E.2d 416]	2-22-00	
Rheem Mfg. v. Phelps Htg. & Air Cond.	714 N.E.2d 1218, 49A02-9807-CV-620	1) failure of essential purpose of con-tract's limited remedy does not, without more, invalidate a wholly distinct term excluding consequential damages; (2) genuine issues of material fact as to whether the cumulative effect of manu-facturer's actions was commercially reasonable precluded summary judgment as to validity of consequential damages exclusion; and (3) genuine issues of material fact as to whether distributor acted as manufacturer's agent precluded summary judgment as to warranty claims	3-23-00	
Noble County v. Rogers	717 N.E.2d 591 57A03-9903-CV-124	Claim brought against governmental entity under Trial Rules for wrongfully enjoining a party is not barred by immunity provisions of Indiana Tort Claims Act.	3-23-00	
G & N Aircraft, Inc. v. Boehm	703 N.E.2d 665 49A02-9708-CV-323,	(1) evidence was sufficient to support breach of fiduciary duty claim against majority shareholder; (2) order directing corporation and majority shareholder to buy out minority shareholder at full value of his shares did not violate appraisal provision of dissenter's rights statute; (3) evidence supported finding that corporation breached fiduciary duty to minority .	3-23-00	

Case Name	N.E.2d citation, Ct. Appeals No.	Court of Appeals Holding Vacated by Transfer Grant	Transfer Granted	Supreme Court Opinion After Transfer
Latta v. State	722 N.E.2d 389 46A02-9811-PC-478	Dual representation of wife and husband in murder prosecution left wife with ineffective assistance of counsel, when husband invoked privilege to remain silent when questioned about wife's role, his silence was used against the wife, and counsel did not cross-examine him about his silence, and when counsel's final argument asked jury to assume husband's confession was to cover up wife's crime	3-29-00	
Lockett v. State	720 N.E.2d 762 02A03-9905-CR-184	Officer's question whether motorist had any weapons in the car or on his person impermissibly expanded a legitimate traffic stop	3-29-00	
Clear Creek Con-servancy District v. Kirkbride	719 N.E.2d 852 67A05-9904-CV-152	Failure to use statutory opportunities to protest and attend hearing on conservancy district assessments did not preclude Trial Rule 60(B)(1) excusable neglect relief from assessments	4-12-00	
Durham v. U-haul International	722 N.E.2d 355 49A02-9811-CV-940	Punitive damages are available in wrongful death actions	5-04-00	
Fratus v. Marion Community School Board	721 N.E.2d 280 27A02-9901-CV-12	(1) Indiana Education Employment Relations Board (IEERB) did not have jurisdiction over teachers' claim against union for breach of its duty of fair representation, and (2) IEERB did not have jurisdiction over teachers' tort and breach of contract claims against school board	5-04-00	
Bemenderfer v. Williams	720 N.E.2d 400 49A02-9808-CV-663	Wrongful death action continues despite death of surviving dependent beneficiary during pendency of the action.	5-04-00	
Carter v. State	724 N.E.2d 281 02A03-9905-PC-191	Guilty plea was properly accepted despite Defendant's statement he was pleading guilty because he could not prove he was innocent, when statement was made at hearing on acceptance of the plea and plea bargain prior to court's accepting it.	5-24-00	
McCarthy v. State	726 N.E.2d 789 37A04-9903-CR-108	Reversible error in teacher's sexual misconduct prosecution to prevent his cross-examination of child's mother about her filing notice of tort claim against school and possible intent to sue defendant personally.	6-08-00	
Zimmerman v. State	727 N.E.2d 714 77A01-9909-CV-318	Cases hold no appeal lies from a prison disciplinary action, but here inmate could bring a civil mandate action to compel DOC to comply with a clear statutory mandate.	8-15-00	
Troxel v. Troxel	720 N.E.2d 731 71A04-9904-CV-162	Requirement that will must be filed for probate within 3 years of death is jurisdictional and may be raised at any time, not just in will contest within 5 months of admission to probate.	8-15-00	
Turner v. City of Evansville	729 N.E.2d 149 82A05-9908-CV-358	Statutory amendments permitting modifications of merit system ordi-nance after certain date applied retro-actively to city's modifications of its merit system ordinance; police chiefs were "officers" subject to constitutional residency requirement; acts of police chiefs were valid as acts of de facto officers; and agreement between city and union regarding changes to merit system ordinance did not violate nondelegation rule.	8-15-00	

Case Name	N.E.2d citation, Ct. Appeals No.	Court of Appeals Holding Vacated by Transfer Grant	Transfer Granted	Supreme Court Opinion After Transfer
Felsher v. City of Evansville	727 N.E.2d 783 82A04-9910-CV-455	University was entitled to bring claim for invasion of privacy; professor properly enjoined from appropriating "likenesses" of university and officials; professor's actions and behavior did not eliminate need for injunction; and injunction was not overbroad..	8-15-2000	
Dow Chemical v. Ebling	723 N.E.2d 881 22A05-9812-CV-625	State law claims against pesticide manufacturer, with exception of negligent design, were preempted by federal FIFRA pesticide control act; pest control company provided a service and owed duty of care to apartment dwellers, precluding summary judgment.	8-15-00	
Sanchez v. State	732 N.E.2d 165 92A03-9908-CR-322	Instruction that jury could not consider voluntary intoxication evidence did not violate Indiana Constitution	9-05-00	
South Gibson School Board v. Sollman	728 N.E.2d 909 26A01-9906-CV-222	Denying student credit for all course-work he performed in the semester in which he was expelled was arbitrary and capricious; summer school is not included within the period of expulsion which may be imposed for conduct occurring in the first semester	9-14-00	
Johnson v. State	725 N.E.2d 984 71A03-9906-CR-225	Threat element of intimidation crime was not proven by evidence defendant showed his handgun to victim	9-14-00	
Poynter v. State	733 N.E.2d 500 57A03-9911-CR-423	At both pretrials Court advised nonindigent defendant he needed counsel for trial and defendant indicated he knew he had to retain lawyer but was working and had been tired; 2nd pretrial was continued to give more time to retain counsel; trial proceeded when defendant appeared without counsel; record had no clear advice of waiver or dangers of going pro se - conviction reversed.	10-19-00	
Ellis v. State	734 N.E.2d 311 10A05-9908-PC-343	When judge rejected 1st plea bargain he stated specifically what he would accept; 2nd agreement incorporated what judge had said was acceptable; P-C.R. denial affirmed, on basis plea voluntary despite judge's "involvement" in bargaining; opinion notes current ABA standards permit court to indicate what it will accept and may be used by trial judges for guidance.	10-19-00	
Moberly v. Day	730 N.E.2d 768 07A01-9906-CV-216	Fact issue as to whether son-in-law was employee or independent contractor precluded a summary judgment declaring no liability under respondeat superior theory; and Comparative Fault Act has abrogated fellow servant doctrine.	10-24-00	
Shambaugh and Koorsen v. Carlisle	730 N.E.2d 796 02A03-9908-CV-325	Elevator passenger who was injured when elevator stopped and reversed directions after receiving false fire alarm signal brought negligence action against contractors that installed electrical wiring and fire alarm system in building. Held: contractors did not have control of elevator at time of accident and thus could not be held liable under doctrine of res ipsa loquitur.		

Case Name	N.E.2d citation, Ct. Appeals No.	Court of Appeals Holding Vacated by Transfer Grant	Transfer Granted	Supreme Court Opinion After Transfer
S.T. v. State	733 N.E.2d 937 20A03-9912-JV-480	No ineffective assistance when (1) defense counsel failed to move to exclude two police witnesses due to state's failure to file witness list in compliance with local rule and (2) failed to show cause for defense failure to file its witness list under local rule with result that both defense witnesses were excluded on state's motion	10-24-00	
Tapia v. State	734 N.E.2d 307 45A03-9908-PC-304	Reverses refusal to allow PCR amendment sought 2 weeks prior to hearing or to allow withdrawal of petition without prejudice	11-17-00	
Tincher v. Davidson	731 N.E.2d 485 49A05-9912-CV-534	Affirms mistrial based on jury's failures to make comparative fault damage calculations correctly	11-22-00	
Burton v. Estate of Davis	730 N.E.2d 800 39A05-9910-CV-468	Wrongful death and survival statutes allow estate of deceased motorist to bring claim against other motorist and employer for tort of intentional interference with civil litigation by spoliation of evidence from the automobile accident	11-22-00	
Brown v. Branch	733 N.E.2d 17 07A04-9907-CV-339	Oral promise to give house to girlfriend if she moved back not within the statute of frauds.	11-22-00	
New Castle Lodge v. St. Board of Tx. Comm.	733 N.E.2d 36 49T10-9701-TA-113	Fraternal organization which owned lodge building was entitled to partial property tax exemption	11-22-00	
Gallant Ins. Co. v. Isaac	732 N.E.2d 1262 49A02-0001-CV-56	Insurer 's agent had "inherent authority" to bind insurer, applying case holding corp. president had inherent authority to bind corp. to contract	11-22-00	
Reeder v. State	732 N.E.2d 1246 49A05-9909-CV-416	When filed, expert's affidavit sufficed to avoid summary judgment but affiant's death after the filing made his affidavit inadmissible and hence summary judgment properly granted.	1-11-01	
Holley v. Childress	732 N.E.2d 1246 67A05-9905-JV-321	Facts did not suffice to overcome presumption noncustodial parent was fit so that temporary guardianship for deceased custodial parent's new spouse was error.	1-11-01	
Cannon v. Cannon	729 N.E.2d 1043 49A05-9908-CV-366	Affirms decision to deny maintenance for spouse with ailments but who generated income with garage sales	1-11-01	
City of New Haven v. Reichhart and Chemical Waste Mgmt. of IN	729 N.E.2d 600 99A02-9904-CV-247	Challenge to annexation financed by defendant's employer was exercise of First Amendment petition right and 12(B)(6) dismissal of city's malicious prosecution claim was properly granted.	1-11-01	
Davidson v. State	735 N.E.2d 325 22A01-0004-PC-116	Ineffective assistance for counsel not to have demanded mandatory severance of charges of "same or similar character" when failure to do so resulted in court's having discretion to order consecutive sentences.	1-17-01	

Case Name	N.E.2d citation, Ct. Appeals No.	Court of Appeals Holding Vacated by Transfer Grant	Transfer Granted	Supreme Court Opinion After Transfer
Griffin v. State	735 N.E.2d 258 49A02-9909-CR-647	Three opinion resolution on admissibility under Ev. Rule 606 of juror affidavits on participation of alternate in deliberations - op. 1 affidavits inadmissible; op 2 affidavits admissible but no prejudice shown, op 3 affidavits admissible and prejudice	1-17-01	
Leshore v. State	739 N.E.2d 1075 02A03-0007-CR-234	(1) Writ of body attachment on which police detained defendant was invalid on its face for failure to include bail or escrow amount, and (2) defendant's flight from detention under the writ did not amount to escape.	1-29-01	
Rogers v. R.J. Reynolds Tobacco	731 N.E.2d 6 49A02-9808-CV-668	(1) trial court committed reversible error by making ex parte communication with deliberating jury, in which jury was advised that it could hold a press conference after its verdict was read, without giving notice to parties; (2) denial of plaintiff's motion for relief from judgment, which was based on public statements by director of one of manufacturers, was within court's discretion; (3) jury was properly instructed on doctrine of incurred risk; (4) evidentiary rulings were within court's discretion; and (5) leave to amend complaint was properly denied	2-09-01	
Mercantile Nat'l Bank v. First Builders	732 N.E.2d 1287 45A03-9904-CV-132	materialman's notice to owner of intent to hold personally liable for material furnished contractor, IC 32-8-3-9, sufficed even though it was filed after summary judgment had been requested but not yet entered on initial complaint for mechanic's lien foreclosure	2-09-01	
State Farm Fire & Casualty v. T.B.	728 N.E.2d 919 53A01-9908-CV-266	(1) insurer acted at its own peril in electing not to defend under reservation of rights or seek declaratory judgment that it had no duty to defend; (2) insurer was collaterally estopped from asserting defense of childcare exclusion that was addressed in consent judgment; (3) exception to child care exclusion applied in any event; and (4) insurer's liability was limited to $300,000 plus postjudgment interest on entire amount of judgment until payment of its limits.	2-09-01	
Merritt v. Evansville Vanderburgh School Corp	735 N.E.2d 269 82A01-912-CV-421	error to refuse to excuse for cause two venire persons employed by defendant even though they asserted they could nonetheless be impartial and attentive	2-09-01	

Case Name	N.E.2d citation, Ct. Appeals No.	Court of Appeals Holding Vacated by Transfer Grant	Transfer Granted	Supreme Court Opinion After Transfer
IDEM v. RLG, Inc	735 N.E.2d 290 27A02-9909-CV-646	the weight of authority requires some evidence of knowledge, action, or inaction by a corporate officer before personal liability for public health law violations may be imposed. Personal liability may not be imposed based solely upon a corporate officer's title.	2-09-01	
State v. Gerschoffer	738 N.E.2d 713 72A05-0003-CR0116	Sobriety checkpoint searches are prohibited by Indiana Constitution.	2-14-01	
Healthscript, Inc. v. State	724 N.E.2d 265, *rhrg.* 740 N.E.2d 562 49A05-9908-CR-370	Medicare fraud crimes do not include violations of state administrative regulations.	2-14-01	